FILE COPY

Office - Supreme Court, U. S.
FILED
APR 24 1947
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 993

VIRGIL D. BELL, ET AL.,

Petitioners,

vs.

SETON PORTER, ET AL.

No. 994

WILLIAM R. ROKEY AND HAROLD McGOWND, ET AL.,

Petitioners,

vs.

DAY AND ZIMMERMAN

No. 995

CLAUDE BOWERS, ET AL.,

Petitioners,

vs.

REMINGTON RAND, INC.

PETITIONS FOR REHEARING AND FURTHER RELIEF

HAROLD LEVENTHAL,
JOHN P. HALEY,
EDWIN A. HALLIGAN,
SAMUEL M. LANOFF,
J. L. THOMAS,
JOHN HALE,
J. C. PRYOR,
JAMES B. MARTIN,
JOSEPH A. LONDRIGAN,
LELAND SIMKINS,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 993

VIRGIL D. BELL, ET AL.,

vs. *Petitioners,*

SETON PORTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 994

WILLIAM R. ROKEY AND HAROLD McGOWND, ET AL.,

vs. *Petitioners,*

DAY AND ZIMMERMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 995

CLAUDE BOWERS, ET AL.,

vs. *Petitioners,*

REMINGTON RAND, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONS FOR REHEARING AND FURTHER RELIEF

---

1. These are combined petitions which pray:

(a) That the petition for certiorari No. 993 in *Bell* v. *Porter,* be granted, and the cause heard on the merits;

(b) That the petitions for certiorari in No. 994, *Rokey* v. *Day and Zimmerman*, and No. 995, *Bowers* v. *Remington Rand*, be maintained on the Court's docket, and within the Court's jurisdiction, pending disposition of No. 993 on the merits.[1] In the event of reversal in No. 993, those cases should be remanded for further proceedings as may be appropriate.

2. On March 31, 1947, the Court granted certiorari in the *Bell* case, No. 993, and denied certiorari in the *Rokey* and *Bowers* cases. On April 7, 1947, the Court vacated its previous order in the *Bell* case and denied certiorari.

3. Petitioners are unaware of the basis for the Court's rulings. Petitioners conceive that that basis may be as follows:

(a) The *Bell* petition presents substantial issues warranting consideration of the merits.

(b) The *Rokey* and *Bowers* petitions present issues which are deemed less substantial, and in the aggregate do not warrant the consideration of three cases by this Court.

(c) Yet the consideration of the *Bell* petition may lead to reversal on grounds which would—or might—warrant reversal in the *Rokey* and *Bowers* cases. Accordingly, granting certiorari in the *Bell* case alone may produce an element of unfairness occasioned by the need for dispatch in the handling of the Court's business. Denial of all three petitions avoids that undesirable result.

If this assumption is sound, it is submitted that the Court can accommodate the various public interests by hearing

---

[1] A similar course was suggested in the Memorandum of National Labor Relations Board filed in *Neptune Meter Co.* v. *National Labor Relations Board*, No. 905, October Term, 1946.

argument in *Bell* v. *Porter*, and withholding final action in the *Rokey* and *Bowers* cases. In the event of reversal in the *Bell* case, this Court could remand the *Rokey* and *Bowers* cases for such action as may be appropriate.

4. Although the three petitions are interrelated to some extent, the *Bell* case presents certain far-reaching and substantial issues, which to some extent are not present in the *Rokey* and *Bowers* cases and to a much greater extent are present in those cases but are shaped by a less clear-cut record, due to the difference in the findings of the trial court.

(a) Perhaps the question of most importance is one whose significance concerns the realistic application of the Act in current practice, apart from any immediate litigation. That issue is the extent to which an employer can maneuver around the Fair Labor Standards Act by obtaining employees' acquiescence in the employer's program, even using coercive pressure where necessary. The trial court's findings in the *Bell* case point up that issue. (Petition No. 993, page 16). The employer obtained the acquiescence of the individual employees—who were not represented by a union or other agent, and were not in the position of "negotiating" an agreement—by threatening to fire them, or at best offer them the choice of transfer to a labor pool or other undisclosed jobs. The appellate court ignored the findings of the trial court in the *Bell* case.[2]

---

[2] In the *Bowers* case the District Court excluded testimony of employer pressure (R. 69), and completely ignored and failed to consider in any way, by either accepting or rejecting, McCormick's testimony as to employer pressure (R. 50). The Government erred in stating that McCormick was in favor of the two-platoon plan (Brief in Opposition No. 995, page 14, citing R. 49). The record reference shows that McCormick

(b) The *Bell* petition also presents the issue, going far beyond the situation of fire guards or any particular class of employees, that in Fair Labor Standards Act cases the determination of "predominant benefit" is a matter of ultimate fact to be resolved by the trial court. That is the teaching of *Skidmore* v. *Swift*, 323 U. S. 134, 136. This is a problem of continuing importance. See *e. g. Campbell* v. *Jones & Laughlin Steel Corp.* (W. D. Pa.), decided April 4, 1947 (Labor Cases, CCH, No. 63695; 15 LW 2575). The court awarded recovery for a 24-hour day to guards required to stay on the premises as additional protection to the mill during a strike. Though plaintiffs were employed in shifts on a basis of eight hours work and eight hours off, and were furnished sleeping accommodations, the court found that the entire 24 hours were spent in the mill predominantly for the employer's benefit. The *Bell* petition raises the substantial question of the proper province of an apellate tribunal, and whether the court below exceeded that province.[3]

(c) In support of the trial court's resolution of this ultimate fact in favor of plaintiffs in the *Bell* case are its findings as to the persistent interruptions to sleep, continued after plaintiffs' complaints. (See record references in Petition No. 993, page 13, Reply Brief, No. 993, page 3.)[4] On that basis the Administrator of the Wages and Hour Division has taken the position in court that the trial court's findings support the judgment for plaintiffs. (Petition No. 993, page 14.)

---

stated he was in favor of that plan on the assumption of pay for all 24 hours.

In the *Rokey* case there was evidence of coercive pressure (No. 994, Testimony of McMurren, R. 49-50; Testimony of Westman R. 54-55).

[3] In the *Rokey* case the trial court directed a verdict.

[4] In the *Rokey* case the trial judge refused to permit such evidence to be introduced (No. 994, R. 20, R. 39).

(d) All three petitions urge the position that as a matter of law time required to be spent by fire guards on the employer's premises, under penalty of being docked, is part of the workweek under the Fair Labor Standards Act, even though the employees are permitted to sleep, because the time is so spent predominantly for the employer's benefit. That question is one of the ambit of the ruling in *Armour & Co.* v. *Wantock*, 323 U. S. 126 of the meaning of the Fair Labor Standards Act.

5. Denial of a petition of certiorari normally imports no decision on the merits. But the nature of this Court's two actions in *Bell* v. *Porter* may be taken to sanction the ruling of the Court below on the general issues discussed above.

6. To some extent the *Rokey* and *Bowers* cases involve all of the foregoing points. But the record in the *Bell* case presents all the substantial issues, and on a record which sharpens them suitably for decision by this Court. By considering the *Bell* case alone, and postponing final action in the *Rokey* and *Bowers* cases, this Court

(a) will consider all of the issues, including those of most substantial and general significance;

(b) will consider those issues on a clear-cut record;

(c) will avoid encumbering its argument docket;

(d) will avoid any discrimination, in the event it should finally decide *Bell* v. *Porter* upon a ground available to petitioners in the *Rokey* and *Bowers* cases.

Conclusion

7. It is prayed that this Court—

(a) grant these petitions for rehearing in No. 993, No. 994, and No. 995;

(b) grant the petition for certiorari in No. 993;

(c) recall the orders denying the petitions for certiorari in No. 994 and No. 995, and maintain these cases on its docket pending disposition of No. 993 on the merits;

(d) render any part of such relief as it deems appropriate.

Respectfully submitted,

HAROLD LEVENTHAL,
Washington, D. C.;
JOHN P. HALEY,
Joliet, Illinois;
EDWIN A. HALLIGAN,
SAMUEL M. LANOFF,
Chicago, Illinois;
J. L. THOMAS,
JOHN HALE,
J. C. PRYOR,
Burlington, Iowa;
JAMES B. MARTIN,
JOSEPH A. LONDRIGAN,
Springfield, Illinois;
LELAND SIMKINS,
Mt. Pulaski, Illinois.

April, 1947.